613, a steam boiler exploded, injuring an employee of the owner. and it was held that the mere happening of the accident was not evidence of negligence.

R. C. W.

JONES' ADM'R *v.* CITY OF RICHMOND.

March 16, 1916.

[88 S. E. 82.]

1. Municipal Corporations (§ 733 (2)*)—Liability for Tort—Street Repairing—"Governmental Function."—A city was liable for death of the motorman of a street car which, on account of the negligence of the driver of a wagon used in street grading work, collided with the wagon, since the work which its servant was engaged in doing was not of a governmental character exempting it from liability for his negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1547, 1561; Dec. Dig. § 733 (2).*

For other definitions, see Words and Phrases, Second Series, Governmental Function.]

2. Death (§ 17*)—"Proximate Cause."—Where the collision of a street car with a city wagon, used in street grading work, resulted in injury to the motorman of the car, and such injury admitted the germs which produced the lockjaw which caused his death, his injury was the "proximate cause" of his death.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 19, 21; Dec. Dig. § 17.*

For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

3. Trial (§ 233 (3)*)—Instruction—Reference to Pleading.—In an action against a city for personal injuries, an instruction telling the jury that if the driver of the city wagon was guilty of negligence in manner and form as alleged in the declaration or some count, etc., they should find for plaintiff, thus devolving upon them the task of determining from a long declaration containing several counts pertinent matter upon which to rest their verdict, was improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 529; Dec. Dig. § 233 (3).*]

4. Trial (§ 234 (2)*)—Instruction—Statement of Facts.—An instruction concluding with a direction to find for the plaintiff, but not containing a complete statement of all facts necessary to a recovery, is improper.

[Ed. Note.—For other cases, see Trial, Dec. Dig. 234 (2).*]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Error to Hustings Court of Richmond.

Action by the administrator of W. G. Jones against the City of Richmond. To review a judgment for defendant, plaintiff brings error. Reversed.

S. S. P. Patteson, of Richmond, and *Henry Wood,* of Clarksville, for plaintiff in error.

H. R. Pollard and *George Wayne Anderson,* both of Richmond, for defendant in error.

HARRISON, J. This action was brought by the plaintiff in error to recover of the defendant in error damages for the death of his intestate, which it is alleged was caused by the negligence of the defendant city.

The deceased was a conductor on one of the street cars of the Virginia Railway & Power Company, and was running his car south along Perry street. When he reached the intersection of Perry and Fifteenth streets, his car collided with one of the city wagons, resulting in what, at the time of the accident, appeared to be a slight bruise and abrasion not larger than a 5-cent piece on the top of one of his feet. This wound, however, subsequently became serious, and on the 9th day from the date of the injury the patient died with what is commonly known as lock-jaw.

It appears that, through her employees, the city was engaged in regarding and improving McDonough street, one of the old streets in its Manchester addition, which involved the removal of a portion of the surface and hauling this surplus earth to a vacant city lot where it was needed. On the 20th of May, 1913, one of the city wagons, drawn by two mules and driven by an experienced and competent driver, was proceeding with a load of earth from McDonough street to the place of deposit, and in crossing Perry street the collision with the street car occurred. The negligence alleged by the plaintiff is that the wagon was operated with a defective brake, which failed to control it; that the driver drove the wagon at a rapid and excessive rate of speed, so that it could not be properly controlled or stopped; that the driver permitted the reins to remain slack in his hands and thereby failed to have proper control of his team, etc., and that these negligent acts combined to cause the wagon to run into the street car and so injure the plaintiff's intestate that he died. These allegations of negligence were vigorously denied by the defendant city, and the contention earnestly made that the accident was the result of the negligence of those in charge of the street car, in running the same at an excessive rate of speed, and in failing to keep a lookout, which would have disclosed the approach of the wagon to Perry street in ample time for the car

to have come to a full stop and avoided the collision with the city's wagon.

The trial resulted in a verdict for the defendant.

At the request of the city, and over the objection of the plaintiff, the court instructed the jury, in substance, that they must find for the defendant; that the city could not be held liable for the negligence of the wagon driver, because, at the time of the accident, he was engaged in the discharge of a governmental function.

[1] The weight of authority sustains the view that the work which the city was doing in the instant case was not of such a character as to exempt it from liability for the negligent acts of its servants and employees. In grading and improving McDonough street the city was not discharging a governmental function, but was merely performing a ministerial duty which afforded it no immunity from liability for its negligence.

In McQuillin on Municipal Corporations, vol. 6, pp. 5431-5433, it is said:

"That a municipality acts ministerially in constructing and repairing public improvements or work, including streets, and hence is liable to persons injured by negligence in the performance of such duties, and this is true notwithstanding the improvements are a public benefit, except, perhaps, where a building is being constructed for public use, such as a courthouse or the like. So it has been held in Missouri, a municipality is liable for the acts of its servant while repairing streets, in assaulting a traveler in the line of his duty, on the theory that the repair of streets is not a governmental duty."

As to when a municipal corporation is acting ministerially, the rule is well stated in Dillon on Municipal Corp. (5th Ed.) vol. 4, §§ 1665, 1741. In note 1 to the last-mentioned section the following statement of the law is italicized:

"A corporation acts judicially in selecting and adopting a plan on which a public work shall be constructed; yet as soon as it begins to carry out that plan, it acts ministerially and is bound to see that it is done in a reasonably safe and skillful manner."

In Quill *v.* New York, 36 App. Div. 476, 55 N. Y. Supp. 889, a city cart removing ashes came into collision with the plaintiff, who sued the city for the damages sustained by her. The defense was made that the city was not liable because it was performing a governmental function. The court held that such work was not governmental. The review of the decisions in the case last cited and the reasoning is convincing.

A recent and well-considered case is Hewitt *v.* Seattle, 62 Wash. 377, 113 Pac. 1084, 32 L. R. A. (N. S.) 632, which holds that the duty of a city to keep its streets in repair is not a gov-

ernmental but a ministerial duty, and that the city is liable to a pedestrian negligently run down and injured by its superintendent of streets while driving an automobile in the performance of his duty.

This subject is discussed and authorities cited in the case of Jones *v.* Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294, where Judge Riely, speaking for this court, points out very clearly the distinction between the exercise of those governmental and discretionary functions for which a city is not liable, and the negligent performance of ministerial duties for which it is liable. It is there said:

"The defendant was empowered by its charter to lay off streets and walks, and improve the same, but it was wholly within its discretion when and where it would do so. For the omission to exercise the power, it being legislative and discretionary, it would not be liable for an injury occurring in consequence of the omission, although when the power was exercised, the duty to keep the streets and sidewalks in a reasonably safe condition for travel would become a ministerial and positive duty, for the neglect whereof it would be liable for an injury resulting therefrom. 2 Dillon Mun. Corp. (4th Ed.), §§ 949, 1048."

We are of opinion that in grading and improving McDonough street and hauling the surplus earth therefrom to a place of deposit elsewhere, the city of Richmond was not exercising a governmental function, but was performing a ministerial duty, and that it would be liable for an injury resulting from the negligent performance of such duty. The instruction under consideration was therefore erroneous, prejudicial to the rights of the plaintiff, and should not have been given.

The defendant city contends that the injury to the decedent's instep was not the proximate cause of his death; that the assault of the tetanus or lockjaw germ, which was after the injury to the foot, was the intervening and proximate cause of death, for which the city was not liable. This position, under the facts and circumstances of the instant case, cannot be sustained. The evidence shows that the deceased was attended by a physician on the day of the accident, who regarded the injury as very slight, but dressed the wound, gave the necessary directions as to its treatment, and told the patient to notify him if he needed further attention. On the seventh day thereafter the doctor was sent for and found that the patient had been suffering for a day or two with pain in the back of his neck and stiffness of the jaws. The doctor at once recognized the beginning of lockjaw, and hurried him to a hospital where he died of lockjaw two days thereafter.

After he was taken to the hospital he was attended by two physicians, both of whom say that he had a well-defined case of lockjaw, caused by tetanus germs which gained entrance through the wound on his foot; that there was no other wound on his body through which the infection could have entered; and that there must be a broken surface somewhere in the skin for the bacillus to get into the body.

[2] The record shows beyond dispute that the injury sustained by the plaintiff's intestate resulted from the collision between the street car and the city wagon, and that such injury admitted the germs which produced the lockjaw which caused his death in a few days. In other words, the city's alleged negligent act opened the way for the trouble that did not cease to operate until the fatal result was reached, without any intervening cause whatever, thereby making the injury the proximate cause of the death.

This subject is considered in the case of Allison *v.* Fredericksburg, 112 Va. 243, 71 S. E. 525, which is also reported and fully annotated in 48 L. R. A. (N. S.) 93. The facts of the two cases are wholly different, and there is nothing in the Allison Case to sustain the view that the injury in the present case was not the proximate cause of the death of the deceased. In L. R. A. where the case is reported, numerous authorities are cited, among them Armstrong's Adm'r *v.* Montgomery St. Ry. Co., 123 Ala. 233, 26 So. 349, a very similar case to the present. There the deceased had two fingers fractured and lacerated in a street car accident. In a few days he died from septicæmia or blood poisoning. The physician said that septic infection meant poisoning of the system from germs, or products of germs introduced into the blood through wounds. The same contention was made there that is now made in the instant case. In refuting the proposition that the injury sustained by the intestate was not the proximate cause of his death, but that his death was the result of an independent intervening cause, to wit, the septicæmia, or blood poisoning, which set in or began to affect his system several days after the injuries were received, the court said:

"It is difficult to conceive how this position can be even plausibly supported. It is clear on this evidence that intestate's death resulted in direct line and sequence of causation from the injuries he received in the fall from the car. * * * The fall produced the injuries, the injuries produced blood poisoning, and the blood poisoning produced death. There was no break in the chain of causation from the alleged negligent act to the death of intestate. The blood poisoning was not an independent cause. It was not a superseding cause. It was itself a result, or, perhaps more accurately, a mere development of the injuries. It is

not an important consideration, even if it be a fact, that blood poisoning is not a usual and ordinary result or development of wounds of the character inflicted upon the intestate. * * * The logical rule in this connection, the rule of common sense and human experience as well, * * * is that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind. 1 Shear. & Red. Neg. § 29."

The case cited is high and very pertinent authority, for there can be no valid distinction, so far as the proximate cause of death is concerned, between wounds admitting germs producing blood poisoning which results in death, and wounds admitting germs producing lockjaw which results in death. In either case there is a reasonable possibility of the fatal trouble being developed in consequence of the wound.

The only remaining objection made in the petition for a writ of error is to the action of the court in refusing five instructions asked for by the plaintiff.

[3, 4] We are of opinion that instruction No. 1, asked for by the plaintiff, was defective in several particulars, and was therefore properly refused. This instruction is very confusing and misleading. It tells the jury that if the driver of the city wagon was guilty of negligence in manner and form as alleged in the declaration, or some count thereof, etc., they should find for the plaintiff, thus devolving upon the jury the task of evolving from a long declaration containing several counts pertinent matter upon which to rest their verdict. This practice has been disapproved by this court. Curtis & Shumway, Inc. *v.* Williams, 118 Va. ——, 86 S. E. 848. The instruction is further erroneous in that it concludes with a direction to the jury to find for the plaintiff, when it does not contain a complete statement of all facts necessary to a recovery.

We are further of opinion that instruction No. 3, asked for by the plaintiff was erroneous and properly refused. This instruction is subject to the same objection as No. 1, in that it concludes with a direction to the jury to find for the plaintiff, without containing a complete statement of the facts necessary to a recovery. It is further defective in telling the jury that at crossings at the intersection of streets, the rights and duties of such companies and the public are equal, whereas the traffic ordinance of the city of Richmond expressly provides that:

"All vehicles and street cars going in an easterly direction or

westerly direction shall have the right of way over all vehicles or street cars going in a northerly or southerly direction."

The testimony is undisputed that the street car was going south and the wagon going east, which, under the ordinance, gave the wagon the right of way at the time of the collision.

We are further of opinion that it was error to refuse instructions Nos. 2, 4, and 5, asked for by the plaintiff. These instructions are in the usual form in cases of like character, and do not appear to be prejudicial to the defendant.

The defendant in error insists that from the record, taken as a whole, it appears that under correct instructions a different verdict could not have been rightly found, and therefore that the judgment complained of should be affirmed. Without comment upon the evidence or expressing any opinion upon the merits of the case, it must suffice to say that under the facts and circumstances shown of record we would not feel warranted, under our practice, in denying the plaintiff the right to have his case submitted to a jury under proper instructions.

For the errors pointed out in the instructions, the judgment complained of must be reversed, the verdict of the jury set aside, and a new trial granted not in conflict with the views expressed in this opinion.

Reversed.

KEITH, P., absent.

Note.—The particular facts involved in the case of Jones *v.* Richmons, 88 S. E. 82, were probably before the Court of Appeals of Virginia for the first time in this case. The decision, however, was based upon a principle established by numerous decisions of the Court of Appeals of Virginia and West Virginia. DeVoss *v.* Richmond, 18 Gratt. 338, 344; Petersburg *v.* Applegarth, 28 Gratt. 321, 344; Noble *v.* Richmond, 31 Gratt. 271, 31 Am. Rep. 726; Orme *v.* Richmond, 79 Va. 86, 89; Terry *v.* Richmond, 94 Va. 537, 27 S. E. 429; Maia *v.* Eastern State Hospital, 97 Va. 507, 34 S. E. 617; Jones *v.* Williamsburg, 97 Va. 722, 723, 34 S. E. 883; Richmond *v.* Long, 17 Gratt. 375, 379; Gas Co. *v.* Wheeling, 8 W. Va. 320, 353; Sawyer *v.* Corse, 17 Gratt. 230; Gibson *v.* Huntington, 38 W. Va. 177, 18 S. E. 447.

The decisions upon this general principle may be divided into two groups. One group follows a course of reasoning which leads to the conclusion that any work done by a municipality in connection with a street is performed in a governmental capacity, and, although injury may result to the individual from the acts or omissions of the person engaged in the performance of the work the municipality is not liable. This view is maintained by the courts of a number of states. See Salzman *v.* New Haven (Conn.), 71 Atl. 509; Barney *v.* Lowell, 98 Mass. 570; Walcott *v.* Swampscott, 1 Allen (Mass.) 101; Taggart *v.* Fall River, 170 Mass. 325, 49 S. E. 622; Hennessey *v.* New Bedford, 153 Mass. 260, 26 N. E. 999; McManus *v.* Weston, 164 Mass. 263, 31 L. R. A. 174, 41 N. E. 301; Wakefield *v.* Newport, 62 N. H. 624; Bates *v.* Rutland, 62 Vt. 178, 9 L. R. A. 363, 22 Am. St. Rep. 95, 20 Atl. 278.

The other group holds that there is a clear distinction between

the governmental duties for the negligent performance of which no liability attaches and the governmental or corporate duties of a community for any negligence in the performance of which a municipality incurs the same liability as a private corporation or an individual. Virginia and West Virginia follow the latter rule. Noble *v.* Richmond, 31 Gratt. 271; Roanoke *v.* Harrison, 1 Va. Dec. 801; Orme *v.* Richmond, 79 Va. 86; Clark *v.* Richmond, 83 Va. 355, 5 S. E. 369; Gordon *v.* Richmond, 83 Va. 436, 2 S. E. 727; Moore *v.* Richmond, 85 Va. 538, 8 S. E. 387; M'Coull *v.* Manchester, 85 Va. 579, 8 S. E. 379; Terry *v.* Richmond, 94 Va. 537, 27 S. E. 429; Jones *v.* Williamsburg, 97 Va. 722, 34 S. E. 883; Winchester *v.* Carroll, 99 Va. 727, 739, 40 S. E. 37; Hicks *v.* Chesapeake, etc., R. Co., 102 Va. 197, 45 S. E. 888; Charlottesville *v.* Failes, 103 Va. 53, 48 S. E. 511; Griffin *v.* Williamstown, 6 W. Va. 312; Wilson *v.* Wheeling, 19 W. Va. 323; Curry *v.* Mannington, 23 W. Va. 14; Mendel *v.* Wheeling, 28 W. Va. 233, 243; Chapman *v.* Milton, 31 W. Va. 384, 7 S. E. 22, 24; Hanley *v.* Huntington, 37 W. Va. 578, 16 S. E. 807; O'Hanlin *v.* Carter Oil Co., 54 W. Va. 510, 46 S. E. 565; Foley *v.* Huntington, 51 W. Va. 396, 41 S. E. 113; Daniels *v.* County Court, 69 W. Va. 676, 72 S. E. 782; Stanton *v.* Parkersburg, 66 W. Va. 393, 66 S. E. 514; Townley *v.* Huntington, 68 W. Va. 574, 70 S. E. 368; Portsmouth *v.* Lee, 112 Va. 419, 71 S. E. 630; Richmond *v.* Mason, 109 Va. 546, 65 S. E. 8; Richmond *v.* Lambert, 111 Va. 174, 68 S. E. 276; Richmond *v.* Schonberger, 111 Va. 168, 68 S. E. 284; Portsmouth *v.* Houseman, 109 Va. 554, 65 S. E. 11; Richmond *v.* Poore, 109 Va. 313, 63 S. E. 1014; Bedford City *v.* Sitwell, 110 Va. 296, 65 S. E. 471.

The court in Jones *v.* Williamsburg, 97 Va. 722, 34 S. E. 883, uses the following language: "A municipal corporation has a dual character, the one public and the other private, and exercises correspondingly twofold functions, the one governmental and legislative, and the other private and ministerial. In its public character, it acts as an agency of the state to enable it the better to govern that portion of its people residing within the municipality, and to this end there is granted to or imposed upon it by the charter of its creation powers and duties to be exercised and performed exclusively for public, governmental purposes. These powers are legislative and discretionary, and the municipality is exempt from liability for an injury resulting from the failure to exercise them or from their improper or negligent exercise. In its corporate and private character there is granted unto it privileges and powers to be exercised for its private advantage, which are for public purposes in no other sense than that the public derives a common benefit from the proper discharge of the duties imposed or assumed in consideration of the privileges and powers conferred. This latter class of powers and duties are not discretionary, but ministerial and absolute; and for an injury resulting from negligence in their exercise or performance, the municipality is liable in a civil action for damages in the same manner as an individual or private corporation. The line of distinction between the two classes of powers and duties is clearly drawn by the courts and text-writers, and the exemption of the municipality from liability in the one case, and its liability in the other for an injury resulting from negligence, firmly established."

The states adhering to this latter rule hold that a municipality is liable for any injuries to a person lawfully upon a street resulting from the negligent acts of servants of the municipality while engaged in the construction, repair or improvements of streets or any other duty which the municipality is performing in its governmental capacity. This rule is also followed by a number of states. Denver *v.* Maurer, 47 Colo. 209, 135 Am. St. Rep. 210, 106 Pac. 875;

Colorado City *v.* Liafe, 28 Colo. 468, 65 Pac. 630; Jones *v.* Atlanta (Ga.), 82 S. E. 540; Cherrydale *v.* Studyvin (Kan.), 91 Pac. 60; Burke *v.* South Omaha, 79 Neb. 793, 113 N. W. 241; Conelly *v.* Nashville, 100 Tenn. 262, 46 S. E. 565.

Perhaps the greatest length to which this rule has been extended was in Missouri in the case of Barree *v.* Cape Girardeau, 132 Mo. App. 182, 112 S. W. 724, where the plaintiff who was operating a street car, left his car in order to clear gravel from the track which had been placed there by order of the city street commissioner. The street commissioner because of the refusal of plaintiff to desist from clearing the gravel from the track attempted to arrest plaintiff, who, in endeavoring to prevent his arrest caught hold of the street car which he was operating. The defendant's servant in forcing him to desist from holding the car used such violence as to permanently injure one of plaintiff's arms. The court decided that the municipality was liable for the injury occasioned by the tort of the street commissioner.

CLAUDE R. YARDLEY.

Charlottesville, Va.